Victoria Packing Corp. *and* United Food and Commercial Workers Local 174, AFL–CIO. Case 29–CA–22386

September 29, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 23, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

Based on the facts as credited by the judge, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet, bargain, and deal with Business Agent John Pierman, the Union's designated representative. We also adopt the judge's finding that the Respondent additionally violated Section 8(a)(5) and (1) by unilaterally abrogating the visitation provisions in article 26 of the parties' collective-bargaining agreement (set out in the opening paragraph of sec. II of the judge's decision), by refusing to permit Pierman access to the Respondent's facility.[3]

The Respondent excepts, asserting, among other things, that the latter violation was neither alleged in the complaint nor litigated at the hearing. For the reasons set forth below, we find no merit in this exception.

Paragraph 9 of the complaint alleges that:

> Since on or about September 2, 1998, Respondent has failed and refused to meet or deal with or bargain with John Pierman regarding terms and conditions of employment of the employees in the Unit *and has refused to permit him access to its Brooklyn facility.* [Emphasis added.]

Paragraph 10 of the complaint alleges that:

> By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

In its answer to the complaint, the Respondent admitted the allegations in paragraph 9, denied the allegations in paragraph 10, and raised the affirmative defense that:

> Respondent was justified in refusing to deal with Pierman *and in denying him access to the plant* because of his violent, threatening and disruptive behavior. [Emphasis added; citations omitted.]

In his opening statement at the hearing, the General Counsel stated that the unfair labor practice allegations were that the Respondent violated Section 8(a)(5) by refusing to meet with Union Representative Pierman for the purpose of discussing grievances and *by refusing to allow Pierman access to the Respondent's facility for the purpose of administering the collective-bargaining agreement*. Shortly thereafter in his opening statement, the General Counsel again asserted that the Respondent denied Pierman visitation rights, *"which under the terms of the collective-bargaining agreement, [the Respondent] had no authority to do."* (Emphasis added.)

In its subsequent opening statement, the Respondent asserted, inter alia, that "the facts will show very clearly that the Company had a right to bar Mr. Pierman," and that "the objectives of the Act of good faith collective bargaining will be promoted by continuing to allow us to bar Mr. Pierman from the premises."

At the close of the opening statements, the judge ascertained from the General Counsel, on the record, that at the time of the events in question there was an existing collective-bargaining agreement between the parties, that it would be introduced into evidence, and that it contained a "visitation clause."

Based on the foregoing, the record establishes, and we find, that (1) the complaint alleges and the Respondent admits that the Respondent has refused to permit Pierman access to the Respondent's Brooklyn facility since

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's description of the holding in *Sahara Datsun*, 278 NLRB 1044 (1986). We modify the judge's decision to clarify that *Sahara Datsun* involved unsubstantiated factual allegations, whereas *Fitzsimmons Mfg. Co.*, 251 NLRB 375 (1980), involved an unprovoked physical assault.

[2] In affirming the judge's findings and conclusions, we do not adopt his comments in fn. 3.

[3] The judge mischaracterized the Respondent's September 2, 1998 letter to Union Secretary/Treasurer Steve Miceli as stating that the Respondent no longer would allow Pierman on the premises. That letter requested that the Union assign another representative to the facility based on Pierman's conduct. Nevertheless, the Respondent admitted that it refused to permit Pierman access to its Brooklyn facility. Moreover, it is uncontroverted that in mid-September 1998, the Respondent refused Pierman entry to its Brooklyn facility to service the shop.

on or about September 2, 1998; (2) the complaint alleges that such refusal constituted a failure and refusal to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the Act; (3) paragraph 10 of the complaint reasonably comprehends an alleged unlawful breach of the contractual visitation clause; (4) the General Counsel's opening statement at the hearing reasonably put the Respondent on notice that the denial of plant access to Pierman was being alleged as an unlawful breach of the contractual visitation clause; and (5) the operative facts underlying the existence of such a breach are undisputed. Therefore, contrary to the Respondent's exception (for which the Respondent has offered no supporting argument) and the position of our dissenting colleague, we find that this violation was both alleged and litigated, and has been properly found.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Victoria Packing Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent failed and refused to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the Act, by failing and refusing to meet, deal with, or bargain with Union Representative Pierman. I further conclude that, as part of its failure and refusal to bargain collectively with the Union, the Respondent's denial of access to Pierman to its Brooklyn facility was violative of Section 8(a)(5) of the Act.

Contrary to the judge and my colleagues, however, I do not find that the Respondent additionally violated Section 8(a)(5) by unilaterally abrogating the parties' contractual visitation provision. Thus, without reaching the "merits" of this issue, I find that as a procedural matter, this "unilateral abrogation" issue was neither raised by the complaint nor fully litigated by the parties. There is a distinction between a unilateral change in a term or condition of employment (in violation of Sec. 8(a)(5)) and an abrogation of a contractual provision (in violation of Sec. 8(d)–8(a)(5)). The former gives rise to an order to restore the status quo ante and to bargain about any change. The latter gives rise to an order to restore the status quo ante and to adhere to the contract for its term.[1]

The General Counsel failed to make it clear that he was making the latter allegation. Indeed, the complaint makes no mention of the parties' collective-bargaining agreement in general or of the visitation provision in particular. And, contrary to my colleagues' findings, paragraphs 9 and 10 of the complaint were insufficient to put the Respondent on notice that it was being charged with abrogating a portion of the parties' contract and, further, that such action was alleged to violate the Act. Nor did the General Counsel at any time seek to amend the complaint to include the "unilateral abrogation" allegation. Further, contrary to my colleagues' assertions, nothing said at the hearing constituted notice to the Respondent that this contract-based violation was being alleged. Although the General Counsel made a passing and background reference to the existence of the contractual visitation provision, the General Counsel at no time alleged an abrogation of that provision as the basis for an unfair labor practice. Indeed, in its posthearing brief to the judge, the General Counsel did not argue that the Respondent had violated Section 8(a)(5) based on a contract abrogation. Significantly, even when the Respondent argued on exception that contract abrogation had neither been alleged in the complaint nor litigated at hearing, the General Counsel remained silent as to whether this unfair labor practice had been pled or prosecuted.

Based on this record and noting the absence of any claim to the contrary by the General Counsel, I conclude, contrary to my colleagues, that the "unilateral abrogation" issue was not properly before the Board. I would, therefore, modify the judge's decision and recommended Order accordingly.

Kevin Kitchen Esq., for the General Counsel.
Martin Gringer, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on October 19, 1999. The charge was filed on November 10, 1998, and the complaint was issued on July 23, 1999. In substance, the complaint alleges that since on or about September 2, 1998, the Respondent has refused to meet or deal with the Union's representative, John Pierman, and has refused to permit him access to its Brooklyn facility. The Respondent asserts that it was justified in refusing to give him access and refusing to deal with Pierman because of "his violent, threatening and disruptive behavior."

On the entire record, including my observation of the demeanor of the witnesses and after reviewing the briefs filed by the parties, I make the following

[1] It appears that the judge, affirmed by my colleagues, recommended such an order. See pars. 1(a) and 2(b) of the judge's Order.

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Charging Party, United Food and Commercial Workers Local 174, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Company and the Union have had a collective-bargaining history for at least 37 years. The most recent contract contains a provision at article 26 which reads:

> The Business Agent or other representative of the Union shall have the right to enter any of the work rooms of the Employer during the time the establishment is open, for the purpose of investigation or for the purpose of discussing with the Employer or its employees any complaint or any other matter affecting the relations between the Employer's employees and the Union.

Pierman has been the union representative designated to service this shop for about 3 years. The evidence shows that the bargaining relationship has been good and that for a considerable amount of time, grievances, when they arise, have been settled before arbitration. Pierman has a practice of visiting the shop on a somewhat regular basis and, in accordance with the contract, can and has talked to employees during worktime.

On or about August 19, 1998, an employee named Jeff Collins made a complaint to the Union that he was suspended because he refused to work an additional amount of overtime after already having already worked 2 overtime hours. This is not in dispute. This matter was then delegated to Pierman.

On August 24, 1998, Pierman spoke to Jeff Collins in the shop who told what happened. Pierman then spoke to the night-shift foreman, Marvin Campbell, and asked him why he had suspended Jeff Collins, particularly as Collins had already worked 2 overtime hours. The foreman, after explaining his reason, refused to discuss the matter further and this apparently angered Pierman who turned around at one point and asked if the foreman was ignoring him. In addition to talking to Collins at his work station for a couple of minutes, Pierman also spoke to some of the other workers in the facility, asking them how things were going and if they had any problems. The most extended conversation he had concerned an employee who didn't have a medical card and Pierman got the man's name and social security number. The evidence indicates that, at most, Pierman spent perhaps 20 minutes in the plant talking individually to the 10 or 15 employees working there. To the extent that his presence in the work area may have caused some delay in production, it could not have been significant and the contract's broad language contemplates that a de minimis impact on production was permissible. Before leaving, Pierman spoke to the foreman who told him that he should leave the plant and that he should only talk to employees on their break time or after work. Pierman, in view of the contract, rightly pointed out that he had a right to be there at a time of his own choosing and did not have to schedule his visits to conform to the Company's wishes. While talking to the foreman two employees appeared at the door and the foreman, told them to go back to work. At the same time, he touched them on the shoulders. Pierman blew up and essentially accused the foreman of assaulting the two men.

What I think happened here was that Pierman got increasingly angry as the evening progressed and finally exploded with the verbal accusation. Pierman came to the factory convinced that the suspension of Jeff Collins was unjustified. And when he tried to talk to the foreman about it, the foreman, in Pierman's mind, did not show him the proper respect when he refused to talk at any length about the issue. Then at the end of his visit, the foreman asserted that Pierman had no right to be there, whereupon he ushered two employees out of the area. It is no wonder that Pierman was extremely put off.

On the following morning, August 25, Pierman came to the plant and attended a meeting with the shop steward, Mae Swann, and two company representatives. This concerned Pierman's assertion that he was going to file a police report against Campbell. Pierman also demanded that the foreman be discharged for shoving the two employees. (However, as the two employees subsequently said that they were only lightly touched and did not want to pursue the matter, Pierman let it drop.)

At some point during the meeting on August 25, the Company's owner, Ben Aquilina, who has a heart condition, entered the room whereupon a shouting match ensued between him and Pierman. The testimony of Aquilina is that Pierman got up very close to his face, and while pointing his finger, yelled "I'm going to get you and you're [sic] fucking company." Pierman acknowledges that there was an argument, but insists that it was provoked by Aquilina's comments about his alleged stoppage of production and statements indicating that Aquilina wanted to fight. In any event, despite some very brief shouting, no physical contact was made by either party and the entire incident transpired in probably less than a minute. The two people were separated by the others whereupon Aquilina went to his office and Pierman left the building.[1]

On September 2, 1998, the Company wrote a letter to Union Treasurer Steve Micelli detailing the events that took place on August 24 and 25 and stating that it no longer would allow Pierman on the premises.

III. ANALYSIS

Pierman clearly is no shrinking violet and he no doubt came on pretty strong when Marvin Campbell, the foreman, appeared to be ignoring him during his attempt to handle an employee's grievance. Moreover, in view of the contract's broad visitation clause, the foreman, perhaps unknowingly, was incorrect in ordering Pierman to leave the premises and stating that he could only talk to employees on their break times or after work. This is clearly not what the contract contemplates, nor does the evidence indicate to me that Pierman abused his visitation rights by the amount of time that he spent with employees during his visit on August 24, 1998.

[1] On balance, I am inclined to credit Aquilina's account of the transaction on August 25.

Things went from bad to worse on August 25 when, at a meeting at the Company's premises, Pierman demanded that the foreman be discharged for allegedly shoving two employees. Then when the Company's owner, Aquilina, entered the room, he and Pierman exploded into a verbal contrempts which, however, never led to any physical confrontation. Thankfully it was quickly dissipated within a minute or two and the two principles went their separate ways.

Nevertheless, this unfortunate incident had no precedent as the evidence shows that the working relationship between the Union and the Company had been quite good for over 37 years and that there were no other untoward events between company representatives and Pierman in the past. Nor were there any subsequent incidents involving Pierman.

The Board in *Fitzsimons Mfg. Co*., 251 NLRB 375, 379 (1980), stated:

> It is well established that each party to a collective-bargaining relationship has both the right to select the representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party. However, where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party's right to choose its representative is limited, and the other party is relieved of its duty to deal with that particular representative.[2]

In *Sahara Datsun*, 278 NLRB 1044, (1986), the Board found that a refusal to deal with a particular individual may be justified where there were egregious situations involving (a) an unprovoked physical assault and (b) unsubstantiated allegations to the affect that the company's owners made false bank loan applications and were involved in other crimes and misdemeanors.

In *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989), the Board held that the employer could not bar a union representative from its premises where that person lightly pushed a manager, cursed at this and another manager, and was involved in a shoving match.

Finally, in *People Care, Inc.*, 327 NLRB 814 (1999), the Board affirmed the conclusions of the administrative law judge that the conduct of various employees brought to the bargaining table did not justify the company's refusal to deal with the union's attorney who was present in the room when a virtual riot broke out. The company argued that the attorney, by his hostile criticism of the company's bargaining position, triggered the riot. But the judge concluded that he neither directly caused the assaults that ensued or that he engaged in any threats or assaults of his own.

As I read these cases, the point is that given the duty to bargain with the other party's chosen agents, either an employer or a union can only refuse to bargain with a designated agent, if that person's conduct is so egregious and beyond the pale as to make the bargaining process itself untenable. For better or worse, the obligation to bargain also imposes the obligation to thicken one's skin and to carry on even in the face of what otherwise would be rude and unacceptable behavior.

In my opinion, even crediting the Company's version of events entirely, I would not conclude that Pierman's conduct, on either August 24 and/or 25, 1998, constituted the type of conduct which could reasonably be construed as tainting the bargaining process as long as he was personally involved. His conduct may have been rude and even excessive in a social or business context. But it was of an extremely short duration, did not involve any kind of physical contact or explicit threat of force, and it was a one time event in an otherwise business like and productive relationship between the Union and the Employer. Accordingly, I conclude that the Respondent violated the Act by refusing to meet and bargain with Pierman as the Union's representative.[3] I further find that the Respondent violated the Act by unilaterally abrogating the collective-bargaining agreement's visitation provisions set forth in article 26 of the contract. *Lihli Fashions,* 317 NLRB 163, 165 (1995), and *West Lawrence Care Center,* 308 NLRB 1011 (1992).

CONCLUSIONS OF LAW

1. By refusing to meet and bargain with the designated representative of United Food and Commercial Workers Local 174, AFL–CIO, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. By unilaterally failing to abide by the visitation clause in the collective-bargaining agreement with the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Victoria Packing Corp., Brooklyn, New York, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain with Union Representative John Pierman.

(b) Refusing to adhere to the terms of the collective-bargaining agreement's visitation clause by refusing to permit Pierman to visit the Company's premises in accordance with the terms of the collective-bargaining agreement.

[2] See also *KDEN Broadcasting*, 225 NLRB 25 (1976), where the Board stated that the test to determine whether a party can refuse to deal with a particular representative is "whether there is persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible."

[3] Nevertheless, I caution the Union that any similar outburst by Pierman in his future dealings with Respondent's management may very well result in his disqualification to be the representative.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request bargain with the Union as the exclusive representative of the employees in the recognized bargaining unit and meet with and bargain with its designated representatives including John Pierman.

(b) In accordance with the provisions of its collective-bargaining agreement, permit union representatives, including John Pierman access to the Company's premises.

(c) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice on forms provided by the regional Director for Region 29, after being signed by the respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

[5] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain with Union Representative John Pierman or any other representative selected by United Food and Commercial Workers Local 174, AFL–CIO.

WE WILL NOT refuse to adhere to the terms of the collective-bargaining agreement's visitation clause at article 26 by refusing to permit Pierman to visit the Company's premises in accordance with the terms of that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, on request, meet and bargain with the representatives chosen by the Union, including John Pierman.

WE WILL permit the Union's designated representatives to visit our facility in accordance with the terms of the collective-bargaining agreement.

VICTORIA PACKING CORP.